



Widener University

Delaware Law School
Environmental & Natural
Resources Law Clinic

August 6, 2015

Mountaire Farms
P.O. Box 710
Selbyville, DE 19975-0710

**Notice of Intent to Sue
FWPCA Section 505 – 33 U.S.C. §1365**

Re: 60 Day Notice of Violation by Mountaire Farms, NPDES Permit No. DE0050326

To Whom It May Concern:

This notice is provided pursuant to § 505(b) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C. § 1365(b), of Food & Water Watch's intent to file suit against the Mountaire Farms facility located at 55 Hosier Street, Selbyville, DE 19975, for illegal discharges and violations of its National Pollution Discharge Elimination System ("NPDES") Permit DE0050326. Delaware Department of Natural Resources and Environmental Control ("DNREC") administers the Clean Water Act NPDES permitting program, § 402 of the CWA, 33 U.S.C. § 1342, under 7 Del. C. § 6003 of the Delaware State Code. The Widener University Delaware Law School's Environmental and Natural Resources Law Clinic ("Clinic") and the Mid-Atlantic Environmental Law Center ("MAELC") represent Food & Water Watch in the matter. The purpose of bringing this action is to achieve full, long-term compliance with environmental laws and to protect and improve the quality of the waters of the State of Delaware.

As described below, Mountaire is in violation of the CWA because it continues to discharge significant amounts of Total Nitrogen Ammonia ("Nitrogen"), Biochemical Oxygen Demand ("BOD"), Oil & Grease, Enterococci, and Total Suspended Solids ("TSS") in violation of its NPDES permit DE0050326. The discharges from Mountaire Farms are directed through permitted outfalls into the Sandy Branch of the St. Martin River, a tributary of Bunting Branch. The effluent limitations contained in the NPDES permit for this facility set limits on pollutants that, if met, protect the designated uses of the receiving waters and the protection of aquatic species. When these permit limits are exceeded, the designated uses are threatened.

Mountaire Farms' permitted outlet discharges into Sandy Branch, a tributary of Bunting Branch, which has been designated by the State of Delaware as suitable for primary and secondary contact recreation, fish, aquatic life, and wildlife, and agriculture water supply uses. Discharges into this section of Bunting Branch that violate permit limits are of particular concern, because of the proximity of the waterway to the town of Selbyville and Sandy Branch's high use for recreation. Ammonia Nitrogen can cause great harm to aquatic life by affecting

hatching and growth rates of fishes, as well as causing changes to the gill, liver, and kidney tissues of fish. Livestock waste is a primary agricultural source of Ammonia Nitrogen. High quantities of Biochemical Oxygen Demand affect the amount of dissolved oxygen in the water and cause stress, suffocation, and death of aquatic species. Enterococci can cause urinary tract infections, bloodstream infections and wound infections in humans. It is also resistant to antibiotics and is, therefore, a threat to public health. The existence of oil and gas in the waterway can taint edible aquatic species, resulting in a risk to those who fish in Sandy Branch. High amounts of Total Suspended Solids can cause microbial growth and are carriers of toxins. These solids also reduce light penetration which reduces algae ability to produce food and oxygen, further limiting the oxygen supply for aquatic species.

Bunting Branch currently has Total Maximum Daily Loads (TMDLs) for Dissolved Oxygen and Nutrients (including Total Nitrogen and Total Phosphorus). However, the TMDLs only apply to nonpoint source pollution because at the time of their creation, there were no point sources within the watershed. Additionally, the TMDLs have not been updated for over a decade and are, therefore, outdated.

As a result of Mountaire Farms' discharges and the impaired state of the Sandy Branch, Food & Water Watch has special concern for the current and future condition of Sandy Branch.

I. IDENTIFICATION OF THE PARTIES AND COUNSEL

Food & Water Watch is a non-profit organization that champions healthy food and clean water for all. Food & Water Watch stands up to corporations that put profits before people, and advocates for a democracy that improves people's lives and protects our environment. The organization is funded fully through its members, individual donors, and foundation grants. Food & Water Watch's address is as follows:

Wenonah Hauter
Executive Director
Food & Water Watch
1616 P Street NW, Suite 300
Washington, DC 20036
Telephone: (202) 683-2500
Fax: (202) 683-2501

The Clinic and MAELC represent Food & Water Watch in this matter. The Clinic is part of the Widener University Delaware Law School's program of legal education, providing Widener students with training while representing individuals and organizations with environmental concerns. MAELC is a non-profit environmental law firm that provides legal services for public interest organizations in environmental matters. MAELC works to ensure that environmental requirements are met, and that legislation and regulations are adequately implemented by responsible federal, state and local agencies. MAELC is located at Widener University Delaware Law School and works in tandem with students in Widener's Environmental and Natural Resources Law Clinic. All correspondence should be directed to:

Kenneth T. Kristl, Esq.
Director, Delaware Law School Environmental and Natural Resources Law Clinic
Executive Director, MAELC
4601 Concord Pike, P.O. Box 7474
Wilmington, DE 19803-0474
Telephone: (302) 477- 2053
Fax: (302) 477-2032

II. BACKGROUND

In 1972, Congress enacted the Clean Water Act to “restore and maintain the chemical, physical and biological integrity of the Nation’s water.” 33 U.S.C. § 1251(a). The CWA’s purpose is to attain water quality which “provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water.” 33 U.S.C. § 1251(a)(2). Except as in compliance with a NPDES permit “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). The term “discharge of any pollutant” means “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). The term pollutant means “dredged spoil, solid water, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water.” 33 U.S.C. § 1362(6).

The act defines a “point source” as “*any* discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, [or] container . . . from which pollutants are or may be discharged.” 33 U.S.C. § 1362(14) (emphasis added). The statute “embrac[es] the broadest possible definition of any identifiable conveyance from which pollutants might enter the waters of the United States.” *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979).

Section 505(b) of the CWA, 33 U.S.C. § 1365(b), requires that sixty (60) days prior to the filing of a citizen suit in the appropriate federal court under § 505(a) of the CWA that the alleged violator, the Environmental Protection Agency (“EPA”), and the State in which the violations occur, be given notice of the alleged violation.

On April 1, 2011, the Delaware Department of Natural Resources and Environmental Control issued NPDES permit DE0050326 under § 402 of the CWA, 33 U.S.C. § 1342, to Mountaire Farms, for the discharge of pollutants from Mountaire Farms located at 55 Hosier Street, Selbyville, Delaware 19975. The permit became effective on April 2, 2011 and is still in effect. Mountaire Farms has been in violation of that permit and there is a “continuing likelihood of a recurrence” of such violations. *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 693 (4th Cir. 1989).

III. MOUNTAIRE FARMS' DISCHARGES VIOLATE EFFLUENT STANDARDS OR LIMITATIONS IN ITS NPDES PERMIT NUMBER DE0050326

Violations of the terms of Mountaire Farms' NPDES permit DE0050326 have occurred and continue to occur at the facility. Data from the monthly Discharge Monitoring Reports ("DMRs") filed by Mountaire Farms demonstrate that Mountaire Farms has violated its NPDES permit on a continuing basis in at least the following respects.

A. BICHEMICAL OXYGEN DEMAND (BOD) VIOLATIONS

The 2011 NPDES permit limitation for Bichemical Oxygen Demand (BOD) is a concentration of 16 mg/L (Daily Average) and a concentration of 26 mg/L (Daily Maximum). Mountaire Farms violated effluent limitations on the following dates:

<i>Monitoring Period</i>	<i>Limit in Permit</i>	<i>Amount Discharged</i>	<i>Type of Permit Limit</i>
3/1/15-3/31/15	16 mg/L	220 mg/L	Daily Average
3/1/15- 3/31/15	26 mg/L	220 mg/L	Daily Maximum
11/1/14- 11/30/14	16 mg/L	149 mg/L	Daily Average
11/1/14- 11/30/14	26 mg/L	149 mg/L	Daily Maximum
9/1/14-9/30/14	16 mg/L	212 mg/L	Daily Average
9/1/14-9/30/14	26 mg/L	212 mg/L	Daily Maximum
8/1/14-8/31/14	16 mg/L	107 mg/L	Daily Average
8/1/14- 8/31/14	26 mg/L	107 mg/L	Daily Maximum
5/1/14-5/31/14	16 mg/L	137 mg/L	Daily Average
5/1/14-5/31/14	26 mg/L	137 mg/L	Daily Maximum
4/1/14-4/30/14	16 mg/L	38.1 mg/L	Daily Average
4/1/14-4/30/14	26 mg/L	38.1 mg/L	Daily Maximum
3/1/14-3/31/14	16 mg/L	70 mg/L	Daily Average
3/1/14-3/31/14	26 mg/L	108 mg/L	Daily Maximum

12/1/13-12/31/13	16 mg/L	227 mg/L	Daily Average
12/1/13-12/31/13	26 mg/L	227 mg/L	Daily Maximum
8/1/13-8/31/13	16 mg/L	380 mg/L	Daily Average
8/1/13-8/31/13	26 mg/L	380 mg/L	Daily Maximum
4/1/13-4/30/13	16 mg/L	213 mg/L	Daily Average
4/1/12-4/30/13	26 mg/L	213 mg/L	Daily Maximum
12/1/12-12/31/12	16 mg/L	118 mg/L	Daily Average
12/1/12-12/31/12	26 mg/L	118 mg/L	Daily Maximum
8/1/12-8/31/12	16 mg/L	225 mg/L	Daily Average
8/1/12-8/31/12	26 mg/L	225 mg/L	Daily Maximum
5/1/12-5/31/12	16 mg/L	247 mg/L	Daily Average
5/1/12-5/31/12	26 mg/L	247 mg/L	Daily Maximum
12/1/11-12/31/11	16 mg/L	168 mg/L	Daily Average
12/1/11-12/31/11	26 mg/L	168 mg/L	Daily Maximum
11/1/11-11/30/11	16 mg/L	216 mg/L	Daily Average
11/1/11-11/30/11	26 mg/L	216 mg/L	Daily Maximum
5/1/11-5/31/11	16 mg/L	143 mg/L	Daily Average
5/1/11-5/31/11	26 mg/L	143 mg/L	Daily Maximum

B. OIL & GREASE VIOLATIONS

The 2011 NPDES permit limitation for Oil & Grease is for a concentration of 8 mg/L (Daily Average) and 14 mg/L (Daily Maximum). Mountaire Farms violated effluent limitations on the following dates:

<i>Monitoring Period</i>	<i>Limit in Permit</i>	<i>Amount Discharged</i>	<i>Type of Permit Limit</i>
3/1/15-3/31/15	8 mg/L	92.4 mg/L	Daily Average
3/1/15-3/31/15	14 mg/L	92.4 mg/L	Daily Maximum
11/1/14-11/30/14	8 mg/L	34.4 mg/L	Daily Average
11/1/14-11/30/14	14 mg/L	34.4 mg/L	Daily Maximum
9/1/14-9/30/14	8 mg/L	70.2 mg/L	Daily Average
9/1/14-9/30/14	14 mg/L	70.2 mg/L	Daily Maximum
8/1/14-8/31/14	8 mg/L	18.2 mg/L	Daily Average
8/1/14-8/31/14	14 mg/L	18.2 mg/L	Daily Maximum
5/1/14-5/31/14	8 mg/L	27.8 mg/L	Daily Average
5/1/14-5/31/14	14 mg/L	27.8 mg/L	Daily Maximum
4/1/14-4/30/14	8 mg/L	29.9 mg/L	Daily Average
4/1/14-4/30/14	14 mg/L	29.9 mg/L	Daily Maximum
3/1/14-3/31/14	8 mg/L	59 mg/L	Daily Average
3/1/14-3/31/14	14 mg/L	113 mg/L	Daily Maximum
12/1/13-12/31/13	8 mg/L	101 mg/L	Daily Average
12/1/13-12/31/13	14 mg/L	101 mg/L	Daily Maximum
8/1/13-8/31/13	8 mg/L	15 mg/L	Daily Average
8/1/13-8/31/13	14 mg/L	15 mg/L	Daily Maximum
4/1/13-4/30/13	8 mg/L	31.2 mg/L	Daily Average
4/1/13-4/30/13	14 mg/L	31.2 mg/L	Daily Maximum
12/1/12-12/31/12	8 mg/L	44 mg/L	Daily Average
12/1/12-12/31/12	14 mg/L	44 mg/L	Daily Maximum

8/1/12-8/31/12	8 mg/L	9 mg/L	Daily Average
5/1/12-5/31/12	8 mg/L	120 mg/L	Daily Average
5/1/12-5/31/12	14 mg/L	120 mg/L	Daily Maximum
12/1/11-12/31/11	8 mg/L	93.6 mg/L	Daily Average
12/1/11-12/31/11	14 mg/L	93.6 mg/L	Daily Maximum
11/1/11-11/30/11	8 mg/L	16.9 mg/L	Daily Average
11/1/11-11/30/11	14 mg/L	16.9 mg/L	Daily Maximum
5/1/11-5/31/11	8 mg/L	17.1 mg/L	Daily Average
5/1/11-5/31/11	14 mg/L	17.1 mg/L	Daily Maximum

C. TOTAL AMMONIA NITROGEN VIOLATIONS

The 2011 NPDES permit limitations for Total Ammonia Nitrogen is for a concentration of 4 mg/L (Daily Average) and a concentration of 8 mg/L (Daily Maximum). Mountaire Farms violated effluent limitations on the following dates:

<i>Monitoring Period</i>	<i>Limit in Permit</i>	<i>Amount Discharged</i>	<i>Type of Permit Limit</i>
11/1/14-11/30/14	4 mg/L	4.18 mg/L	Daily Average
9/1/14-9/30/14	4 mg/L	4.15 mg/L	Daily Average
12/1/13-12/31/13	4 mg/L	6.26 mg/L	Daily Average
8/1/13-8/31/13	4 mg/L	5.32 mg/L	Daily Average
4/1/13-4/30/13	4 mg/L	6.64 mg/L	Daily Average
5/1/12-5/31/12	4 mg/L	8.32 mg/L	Daily Average
5/1/12-5/31/12	8 mg/L	8.32 mg/L	Daily Maximum
12/1/11-12/31/11	4 mg/L	7.88 mg/L	Daily Average

11/1/11-11/30/11	4 mg/L	8.90 mg/L	Daily Average
11/1/11-11/30/11	8 mg/L	8.90 mg/L	Daily Maximum
5/1/11-5/31/11	4 mg/L	5.57 mg/L	Daily Average

D. TOTAL SUSPENDED SOLIDS (TSS) VIOLATIONS

The 2011 NPDES permit limitations for Total Suspended Solids (TSS) is for a concentration of 20 mg/l (Daily Average) and 30 mg/l (Daily Maximum). Mountaire Farms violated effluent limitations on the following dates:

<i>Monitoring Period</i>	<i>Limit in Permit</i>	<i>Amount Discharged</i>	<i>Type of Permit Limit</i>
3/1/15-3/31/15	20 mg/L	1232 mg/L	Daily Average
3/1/15-3/31/15	30 mg/L	1232 mg/L	Daily Maximum
11/1/14-11/30/14	20 mg/L	372 mg/L	Daily Average
11/1/14-11/30/14	30 mg/L	372 mg/L	Daily Maximum
9/1/14-9/30/14	20 mg/L	273 mg/L	Daily Average
9/1/14-9/30/14	30 mg/L	273 mg/L	Daily Maximum
8/1/14-8/31/14	20 mg/L	235 mg/L	Daily Average
8/1/14-8/31/14	30 mg/L	235 mg/L	Daily Maximum
5/1/14-5/31/14	20 mg/L	657 mg/L	Daily Average
5/1/14-5/31/14	30 mg/L	657 mg/L	Daily Maximum
4/1/14-4/30/14	20 mg/L	533 mg/L	Daily Average
4/1/14-4/30/14	30 mg/L	533 mg/L	Daily Maximum

3/1/14-3/31/14	20 mg/L	1874 mg/L	Daily Average
3/1/14-3/31/14	30 mg/L	3680 mg/L	Daily Maximum
12/1/13-12/31/13	20 mg/L	3160 mg/L	Daily Average
12/1/13-12/31/13	30 mg/L	3160 mg/L	Daily Maximum
8/1/13-8/31/13	20 mg/L	530 mg/L	Daily Average
8/1/13-8/31/13	30 mg/L	530 mg/L	Daily Maximum
4/1/13-4/30/13	20 mg/L	673 mg/L	Daily Average
4/1/13- 4/30/13	30 mg/L	673 mg/L	Daily Maximum
12/1/12-12/31/12	20 mg/L	818 mg/L	Daily Average
12/1/12-12/31/12	30 mg/L	818 mg/L	Daily Maximum
8/1/12-8/31/12	20 mg/L	1660 mg/L	Daily Average
8/1/12-8/31/12	30 mg/L	1660 mg/L	Daily Maximum
5/1/12-5/31/12	20 mg/L	1870 mg/L	Daily Average
5/1/12-5/31/12	30 mg/L	1870 mg/L	Daily Maximum
12/1/11-12/31/11	20 mg/L	804 mg/L	Daily Average
12/1/11-12/31/11	30 mg/L	804 mg/L	Daily Maximum
11/1/11-11/30/11	20 mg/L	470 mg/L	Daily Average
11/1/11-11/30/11	30 mg/L	470 mg/L	Daily Maximum

5/1/11-5/31/11	20 mg/L	33.1 mg/L	Daily Average
5/1/11-5/31/11	30 mg/L	33.1 mg/L	Daily Maximum

E. ENTEROCOCCI VIOLATIONS

The 2011 NPDES permit limitations for Enterococci is for a concentration of 100 Col/100mL (Daily Average) and 185 Col/100mL (Daily Maximum). Mountaire Farms violated effluent limitations on the following dates:

<i>Monitoring Period</i>	<i>Limit in Permit</i>	<i>Amount Discharged</i>	<i>Type of Permit Limit</i>
3/1/15-3/31/15	100 Col/100mL	41,000 Col/100mL	Daily Average
3/1/15-3/31/15	185 Col/100mL	41,000 Col/100mL	Daily Maximum
11/1/14-11/30/14	100 Col/100mL	537,000 Col/100mL	Daily Average
11/1/14-11/30/14	185 Col/100mL	537,000 Col/100mL	Daily Maximum
9/1/14-9/30/14	100 Col/100mL	546,000 Col/100mL	Daily Average
9/1/14-9/30/14	185 Col/100mL	546,000 Col/100mL	Daily Maximum
8/1/14-8/31/14	100 Col/100mL	325,500 Col/100mL	Daily Average
8/1/14-8/31/14	185 Col/100mL	325,500 Col/100mL	Daily Maximum
5/1/14-5/31/14	100 Col/100mL	572,200 Col/100mL	Daily Average
5/1/14-5/31/14	185 Col/100mL	572,200 Col/100mL	Daily Maximum